

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

FILED
February 24, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
)
 v.)
)
)
 JIMMY D. McELROY,)
)
)
 APPELLANT.)

No. 03-C-01-9506-CR-00160

Loudon County

E. Eugene Eblen, Judge

(DUI)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Jimmy D. McElroy, was convicted of driving under the influence by consent, a Class A misdemeanor, by a jury of his peers. The trial court sentenced the appellant to pay a fine of \$1,000 and serve eleven months and twenty-nine days in the Loudon County Jail. All but four days of the sentence was suspended. In this Court, the appellant contends (a) the evidence is insufficient to support his conviction and (b) the trial court committed error by permitting the State of Tennessee to introduce evidence concerning the results of the gaze nystagmus test. After a thorough review of the record, the briefs submitted by the parties, and the authorities which govern the issues, this Court is of the opinion the judgment of the trial court should be affirmed.

On June 6, 1993, at approximately 3:30 a.m., the Lenoir City Police Department received a report concerning the reckless operation of a motor vehicle on Broadway. The party making the call described the vehicle and stated the vehicle was "all over the road." The dispatcher advised the officers on duty of the complaint and gave a description of the vehicle.

Officer Jonathan Sartin, a Lenoir City police officer, intercepted the vehicle at the intersection of Broadway and C Street. Officer Sartin followed the vehicle. He saw the vehicle cross the center line of the roadway on three separate occasions. He stopped the vehicle at the intersection of Broadway and F Street.

Sherry Lynn Thompson (McCreary)¹ was driving a motor vehicle owned by McElroy, who was a passenger in the vehicle. Officer Sartin's investigation revealed a strong odor of an intoxicant on McCreary's breath. Her speech was slurred, and her eyes were bloodshot. When she exited the vehicle, she was unsteady on her feet. She failed the field sobriety tests. When informed she was under arrest for driving while intoxicated, McCreary became belligerent. Her attitude continued until she was placed in a cell. She refused to take a chemical breath test. Officer Sartin and a jailer were of the opinion McCreary was under the influence of an intoxicant.

¹Sherry Lynn McCreary is her maiden name. She was indicted as Sherry L. Thompson, her married name.

Both McCreary and McElroy testified in support of their respective defenses. McCreary denied consuming an intoxicating beverage. She claimed she had successfully performed the field sobriety tests. She did not know why she was stopped by the police.

McElroy admitted he had consumed two or three beers. He also stated he was taking a medication with codeine, and he consumed cough medicine every two hours. He too denied McCreary had consumed an alcoholic beverage on the date in question. She drank iced water and coca-cola.

Unlike McCreary, McElroy submitted to a chemical breath test. He registered .18. He had a strong odor of an intoxicant on his breath; his speech was slurred; and he had bloodshot eyes. He was unsteady on his feet when he exited the vehicle. He failed the field sobriety tests. Officer Sartin was of the opinion McElroy was under the influence of an intoxicant.

I.

The appellant contends the evidence contained in the record is insufficient to support a finding by a rational trier of fact that the appellant is guilty beyond a reasonable doubt of driving while under the influence by permitting McCreary to drive his motor vehicle. He argues "the testimony of Officers Hensley and Sartin are somewhat contradictory as to their observations as to the condition of defendant McCreary, and that defendant McCreary offered a reasonable explanation for not taking the blood alcohol tests."

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those

drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

The evidence contained in the record is sufficient to support a finding by a rational trier of fact that the appellant was guilty of permitting a person under the influence to operate his motor vehicle, while he was a passenger in the vehicle, beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The questions of credibility of the officers' testimony and any conflict in their testimony was resolved by the jury. This Court is not permitted to reweigh or reevaluate the testimony of the officers.

The State of Tennessee established the motor vehicle being operated by McCreary was weaving across the center line of the street. McCreary was unsteady on her feet after exiting the vehicle. She was emanating a strong odor of an intoxicating beverage; her eyes were bloodshot; her speech was slurred; she failed the field sobriety tests; and, when

advised she was under arrest, she became belligerent. The state also established the appellant owned the vehicle being operated by McCreary, and he candidly admitted he asked her to operate the motor vehicle.

This issue is without merit.

II.

The appellant contends "[t]he trial court erred in admitting the results of the horizontal gaze nystagmus test without requiring a foundation [for the introduction of this evidence] and demonstration showing that the test is generally accepted in the scientific community, or demonstrating that the officer was an expert on the HGN test as required by Rule 702 of the Tennessee Rules of Evidence." This issue addresses the test administered by Officer Sartin to McCreary. The appellant acknowledges this fact in his brief.

Assuming arguendo McElroy has standing to challenge the test given to McCreary, the only objection to the introduction of this evidence was: "There's no foundation, no basis for the determination of what 30 or 35 percent range is, what 30 or 35 percent indicates. He's making a statement that isn't legal, that it indicates intoxication. There is no basis for the statement." As can be seen, the objection challenged the failure of the state to lay a proper foundation for the results of the test. No one objected on the ground the state failed to establish "the test is generally accepted in the scientific community, or demonstrating that the officer was an expert on the HGN test." Thus, the only issue this Court can resolve is whether a foundation was laid for the introduction of the test results.

In the context of this case, whether the state laid a sufficient foundation for the introduction of the test results will not affect the decision of this Court. Assuming arguendo the admission of the test results was error, it was harmless. Tenn. R. App. P. 36(b).

Two additional field sobriety tests were administered to McCreary. The results of these tests are not challenged in this Court. Furthermore, the state introduced independent evidence, which if believed by the jury, was clearly sufficient to support the appellant's conviction.

This issue is without merit.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

JOHN K. BYERS, SENIOR JUDGE